

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Gross Electric, Inc. and International Brotherhood of Electric Workers, Local 236. Case 03–CA–187577

May 9, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On May 22, 2017, Administrative Law Judge Ira Sandron issued the attached decision. The General Counsel filed exceptions and a supporting brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The General Counsel excepts to the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire John Mosher (Mosher) because he engaged in union or other protected activity under the Act. For the reasons that follow, we reverse the judge and find this violation.

A. Facts

The Respondent, an electrical contractor in the construction industry, is a signatory to a collective-bargaining agreement between the Albany Chapter of the National Electrical Contractors Association and International Brotherhood of Electric Workers, Local 236 ("Union"), effective June 1, 2015, until May 31, 2018. The agreement contains an exclusive hiring hall provision and a grievance procedure. Under the agreement's grievance procedure, if the parties are unable to adjust a grievance within 48 hours, it is automatically referred to a labor-management committee consisting of three employer representatives and three union representatives. Union president John Mosher served as one of the union representatives on the committee.

On September 27, 2016,² the labor-management committee held a grievance hearing concerning a grievance filed by Jimmy Miller, an inside journeyman wireman. The Respondent had rejected Miller for a job at the Lafarge project in Ravena, New York, where it had a contract for electrical work. During the grievance hearing, Joseph Gross, the Respondent's president and own-

er, was asked why he had rejected so many applicants for employment. He responded that he generally left the selection of applicants to his job foremen. Mosher asked Gross what the harm would be in giving a chance to applicants who had never previously worked for him. Gross answered that the collective-bargaining agreement gave him the right to reject an applicant for any reason. They continued to debate this issue. Someone other than Gross or Mosher brought up the name of Robert Warrings, the lead general foreman on the Lafarge project. Mosher subsequently made derogatory comments about Warrings and his management style, including that Warrings bullied employees, and also criticized Gross for employing Warrings as general foreman. Although the interaction between Mosher and Gross was heated, neither of them engaged in any threatening behavior.

Thereafter, Mosher applied to work at the Lafarge project on several dates, but was rejected each time. Union steward Michael Martell, who spoke to Warrings about the Respondent's refusal to hire Mosher, testified that Warrings stated that:

John [Mosher] had gone around bad mouthing Joe Gross and his company and [me], and that if John thought that he was going to go around and speak negatively of the Company and of [me], and then think he was going to work for [me], that it wasn't going to happen.

Martell later talked to Jerry Jones, the superintendent at the Lafarge project, about the Respondent's refusal to hire Mosher. Jones explained that Mosher "had burned his bridge with Gross Electric due to his actions at a previous interaction with Joe Gross." Subsequently, at a labor-management cooperation committee meeting, Gross observed that he had rejected Mosher because of what Mosher had said about Warrings and his management style, and the need to avoid a hostile worksite situation. Gross testified that he alone made the decision not to hire Mosher "based on his negative comments" at the September 27 hearing.

B. Discussion

The judge found that Mosher was not engaged in protected concerted activity at the September 27 grievance hearing when he criticized the Respondent's hiring process, including Warrings' conduct as a manager. In support of this finding, the judge reasoned that, because the Union had never filed any grievances against Warrings for bullying or other inappropriate conduct, nor had it filed grievances against the Respondent's hiring practices under the collective-bargaining agreement, Mosher's criticisms of Warrings' conduct did not involve issues pertaining to the collective-bargaining agreement. The

¹ By order dated September 13, 2017, the Board denied the Respondent's request for acceptance of its untimely answering brief.

² All dates are in 2016, unless otherwise noted.

judge also emphasized that the union representatives at the hearing, including Mosher, rejected Miller's grievance and that, therefore, Mosher was not acting on behalf of the Union when he made disparaging comments about the Respondent's hiring practices and criticized Gross for employing Warrings.

Contrary to the judge, we find that Mosher was engaged in protected union activity. Initially, we note that the judge correctly recognized that Mosher attended the grievance hearing in his capacity as union president, explaining that his "conduct was solely in connection with his role as a union official." It is true that Mosher's conduct does not automatically constitute union activity simply because he is a union official or because his statements were made during a grievance proceeding. See *Tampa Tribune & Richard Banos*, 346 NLRB 369, 370-371 (2006) (employee was not engaged in union or other concerted activity during his coaching session with foreman where employee was present in foreman's office as an employee and not in his representative capacity as a union steward); *Roemer Industries, Inc.*, 362 NLRB No. 96, slip op. at 7 (2015) (observing that union stewards involved in the processing of grievances generally enjoy the Act's protection, but recognizing that not all conduct occurring in that context is protected), enfd. mem. 688 Fed. Appx. 340 (6th Cir. 2017). Here, however, the judge failed to consider that Mosher's statements expressing concerns about a supervisor's unfair treatment and selection of workers at a job site were directly related to union members' employment concerns and, thus, directly related to his role as union president. Therefore, it follows that Mosher's criticisms about the Respondent's hiring policies, Warrings' conduct as a supervisor, and Gross constituted protected union activity. See, e.g., *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6-7 (2016) (employer violated Section 8(a)(3) by refusing to hire the union president where the hiring officials relied in part on the employee's conduct when she was performing her duties as union president as the basis for the refusal), enfd. 871 F.3d 358 (5th Cir. 2017); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 361 (2000) (employee was engaged in protected union activity when, as union steward, she complained on behalf of employees about a supervisor), enfd. 297 F.3d 468 (6th Cir. 2002); *BASF Wyandotte Corp.*, 278 NLRB 173, 183 (1986) (employer violated Section 8(a)(3) for issuing an oral warning to employee for his conduct when he was acting in the capacity of a union representative at a meeting with the employer's managers).³

³ See also *New York Telephone Co.*, 304 NLRB 183, 188 (1991) (employer unlawfully disciplined employee who, in her capacity as steward, disputed employer's permission-only rule for use of lounge);

In addition, there is no support in Board law for the judge's rationale that Mosher was not engaged in union activity because the Union had not filed a grievance against Warrings nor filed grievances challenging the Respondent's hiring policies. A union official is not required to file a grievance in order to be engaged in union activity or to be protected from retaliation. See, e.g., *Titanium Metals Corp.*, 274 NLRB 706, 707 (1985) (finding unlawful retaliation against a union steward who had spoken out for employees but "did not file a grievance over [the issue]"). Moreover, we reject the judge's reasoning that Mosher's statements did not constitute protected union activity because the union-side members of the labor-management committee (including Mosher) voted to reject the grievance. As explained above, the fact that Mosher's statements occurred in the context of a grievance procedure is not controlling here. Rather, the issue is that Mosher, as union president, raised concerns with the Respondent pertaining to union members' employment-related issues. Accordingly, the ultimate outcome of the grievance is not relevant to our finding that Mosher was engaged in protected union activity.

Finally, the judge erred in finding the absence of animus or other unfair labor practices committed by the Respondent to be a significant factor.⁴ Because the Respondent acknowledged that it did not hire Mosher because of his statements at the September 27 grievance hearing—statements that clearly constituted protected union activity—evidence of animus is not a necessary part of the analysis. The Board has consistently held that where an employer undisputedly takes action against an employee for engaging in protected activity, a *Wright Line*⁵ analysis is not appropriate. See, e.g., *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003); *Nor-Cal Beverage Co.*,

Moore's Cafeteria Services, 271 NLRB 287, 287 fn. 2 (1984) (employer violated Sec. 8(a)(3) by refusing to hire applicant because of her union activities and other protected concerted activities where employer's supervisors worked as supervisors for the employer's predecessor and, during that time, had numerous contacts with employee who was an assertive union steward).

⁴ Member Emanuel agrees with the judge that there is no evidence that Joe Gross harbored any animus against the Union or against John Mosher for his union affiliation. To the contrary, Gross was a long-time member of the IBEW. In his view, Gross' conflict with Mosher was largely personal and based on Mosher's criticism of Gross' management and hiring practices. However, he agrees with his colleagues that Gross' decision not to hire Mosher at the Lafarge project was in response to Mosher's protected statements at the September 27 grievance meeting, and he also agrees that evidence of animus is not necessary to that finding. He therefore joins his colleagues in finding the violation.

⁵ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

330 NLRB 610, 611–612 (2000); *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2 (1994).

For all of the above reasons, we reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by refusing to hire John Mosher because he engaged in union activity while serving as local president of the Union during a grievance hearing.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3 in the judge's decision.

“3. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire John Mosher because he engaged in union activity while serving as local president of the Union during a grievance hearing.”

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully refused to hire John Mosher, we shall order the Respondent to offer him instatement and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall also order the Respondent to compensate John Mosher for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 1 fn. 2 (2016), *enfd.* in pertinent part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*.

Finally, we shall require the Respondent to compensate John Mosher for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Gross Electric, Inc., Queensbury, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants for employment because of their union or other protected, concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer John Mosher immediate employment (instatement) to the position for which he applied, or, if such position no longer exists, to a substantially equivalent position.

(b) Make John Mosher whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section in this decision, plus reasonable search-for-work and interim employment expenses.

(c) Compensate John Mosher for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire John Mosher, and within 3 days thereafter, notify him in writing that this has been done and that the refusal to hire will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Queensbury, New York facility copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are cus-

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

tomarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities at any time since October 20, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 9, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire job applicants because they engaged in union or other protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer John Mosher immediate employment (in-statement) to the position for which he applied, or, if such position no longer exists, to a substantially equivalent position.

WE WILL make John Mosher whole for any loss of earnings and other benefits resulting from the unlawful discrimination against him, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate John Mosher for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire John Mosher and we will, within 3 days thereafter, notify him in writing that this has been done and that the refusal to hire will not be used against him in any way.

GROSS ELECTRIC, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-187577 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Alexander J. Gancayco, Esq., for the General Counsel.
Mark W. Couch, Esq. (Couch Dale Marshall P.C.), for the Respondent.

DECISION
STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case is before me on a January 11, 2017 complaint and notice of hearing (the complaint) stemming from an unfair labor practice charge that International Brotherhood of Electric Workers, Local 236 (the Union or the Local) filed on November 4, 2016,¹ against Gross Electric, Inc. (the Respondent or the Company).

I conducted a trial in Albany, New York, on March 28 and 29, 2017, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issue

Did Joseph Gross, the Respondent's president and owner, refuse to hire Union President John Mosher as a journeyman electrician on the Lafarge project (Lafarge) on and after October 20, because Mosher engaged in union activity at a grievance hearing held on September 27, more specifically making statements concerning the Respondent's hiring practices and General Foreman Robert Warrings at Lafarge?²

Witnesses and Credibility

The General Counsel called Mosher; Mark Lajeunesse, union business manager and financial secretary, who attended the grievance hearing; Michael Martell, union recording secretary and union steward at Lafarge; and Gross as an adverse witness under Section 611(c).

The Respondent examined Gross after his Section 611(c) testimony, and called two individuals who were at the grievance hearing: Stephen Chamberlain, manager of the National Electrical Contractors Association (NECA), Albany Chapter; and Kevin Haggerty, president of Flex Electric.

The Respondent's counsel sought to offer the testimony of Brian Hart of George Martin Electric, proffering that he would testify that at a holiday party prior to September 27, Mosher got into an altercation with other Local members. I rejected that testimony on several grounds: (1) Gross' testimony that his knowledge of such played little role in his decision to deny Mosher employment; (2) the lack of a logical nexus between what might have taken place at a holiday party and Mosher's conduct and statements at the September 27 grievance hearing; and (3) no suggestion by Gross that he considered Mosher violent or threatening. Indeed, Gross testified that aside from the one grievance hearing, they otherwise have enjoyed an amiable relationship in their labor-management interactions.

Credibility resolution is not critical to deciding the issue in this case. As might be expected, the various witnesses to what occurred between Mosher and Gross at the grievance hearing had variations in recall, but the substance of their descriptions

varied in detail but not in substance, and none of their versions were in direct conflict on material points.

I note that Gross testified that he would have been willing to hire Mosher at jobsites other than Lafarge had Mosher applied for them (which he did not). In this regard, Martel testified without contradiction that on October 21, Warrings and Superintendent Jerry Jones both admitted 2(11) supervisors, told him that Mosher was on a "do not hire" list. Inasmuch as it is unclear whether this referred only to Lafarge or to all of the Respondent's jobs, I do not find this testimony necessarily inconsistent with Gross', and whether Gross would have rejected Mosher for other jobs remains conjectural. Either way, the issue remains the legitimacy of Gross' motivation for not hiring Mosher for Lafarge.

There was conflicting testimony regarding if and when the Respondent announced a change in the way employees could obtain the training that the Mine Safety and Health Administration required for electricians to work on the Lafarge jobsite. However, resolving this disagreement is unnecessary inasmuch as the Respondent does not contend that Mosher lacked the requisite qualifications when he applied for work at the project starting on October 20, and thereafter.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, written and oral stipulations, and the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

The Respondent at all material times has been a corporation with an office and place of business in Queensbury, New York, conducting business as an electrical contractor in the construction industry and engaged in commercial and industrial construction. The Respondent does not contest jurisdiction as alleged in Paragraph 2 of the complaint, and I therefore find statutory jurisdiction.

Joseph Gross has been the president and sole owner of the Company since it began operations in 1994. Since before then, he has been a member of the Local.

The Respondent is signatory to the collective-bargaining agreement between the Albany Chapter of the National Electrical Contractors Association (NECA) and the Union, effective June 1, 2015, until May 31, 2018. (GC Exh. 3.) Relevant provisions follow.

The agreement contains an exclusive hiring hall provision (art. IV sec. 4.02) and, by its terms, gives an employer unfettered discretion in determining whom to hire: (1) Article II section 2.03 (management rights) provides, *inter alia*, that the employer shall have no restrictions on hiring employees; and (2) Article IV section 4.03 states, "The Employer shall have the right to reject any applicant for employment."

The grievance procedure is set out in article I. The first step is attempted adjustment by one representative of each party. If they are unable to adjust a grievance within 48 hours, it is automatically referred to a labor-management committee consisting of three employer representatives and three union representatives. The committee decides grievances by majority vote.

Both Gross and John Mosher, Local president since July 2015, are trustees for a contractual trust funds committee (con-

¹ All dates hereinafter occurred in 2016 unless otherwise indicated.

² The General Counsel does not allege that Mosher engaged in protected concerted activity separate and distinct from his conduct as union president. In any event, nothing in the record shows that any employees ever sought to have Mosher act on their behalves in any capacity other than in his role as a union official. Accordingly, I need not address the arguments in the Respondent's brief disputing that Mosher engaged in 8(a)(1) protected concerted activity.

cerning pensions, health and welfare, and annuities) and also serve on the contractual labor management cooperation committee (LMCC).

Operation of the Referral System

When an employer such as the Respondent needs electricians, it places a manpower request through the Union's referral agent. Members looking for work hear a tape recording of jobs being offered and then apply by phone. The Union maintains a daily report or log of members who applied and were referred for work. See General Counsel Exhibit 17, the reports from October 20 to November 4. Members are ranked in numerical order, with those with the lowest number on top and referred out first. The Union then provides the referrals to an employer, who can accept or reject them. The employer is required to put in writing its rejections or "spins" of applicants. See General Counsel Exhibit 18, all of the Respondent's rejections for Lafarge from October 20 to November 4.

Members are not required to apply for an announced job. However, if they do not, and members below them on the list do and get hired, they get a "ding" or a "strike." This applies if a member who has been rejected for a job does not continue to apply for further postings of the same job; the Union tells members to continue to apply because employers sometimes change their minds and hire applicants they previously rejected. An applicant who applies for a job, receives an offer, and then turns it down also is given a ding. Three dings results in being removed from the list and having to come back in and re-sign up. Applicants who are rejected do not receive dings. Mosher has never received any dings.

The September 27 Grievance Hearing

Jimmy Miller, an inside journeyman wireman, had given up another job, out of the area, to apply for Lafarge. However, the Respondent exercised its right under section 4.03 not to hire him, and Miller filed a grievance alleging that his nonselection was a violation of the "basic principles" (harmonious relations) section of the agreement (GC Exh. 3 at 3). (GC Exhs. 4, 5.)

On the morning of September 27, the labor-management committee met at NECA headquarters in Albany to hear two grievances, the second of which was Miller's against the Respondent. The Union's committee persons included President John Mosher, Business Manager Mark Lajeunesse, and Assistant Business Manager Michael Torres, who took notes. Kevin Haggerty of Flex Electric was one of the three employer representatives. Also in attendance were Stephen Chamberlain, NECA Albany Chapter manager, and a union representative.

Miller, represented by Union Assistant Business Manager Paul Fitzmourice, presented his case to the committee first. He asked why, never having worked for the Respondent, he would not be given an opportunity to prove himself. I credit Chamberlain's uncontroverted and plausible testimony that Miller got very emotional. Torres' notes of the meeting (GC Exh. 16 at 2) reflect that Fitzmourice stated that there was no violation of section 4.03, which gave the contractor the right to refuse an applicant.

After Miller and Fitzmourice left, Gross came into the room. He first distributed a spreadsheet listing applicants that the Respondent had rejected by project and date. (GC Exh. 8.)

When Gross was asked why he had rejected or "spun" so many applicants, he responded that he generally left the selection or rejection of applicants to his job foremen (at Lafarge, they included General Foreman Robert Warrings), who were more familiar with their needs and the qualifications of applicants. Gross cited both section 4.03 and the management rights clause as giving him the right to reject an applicant for any reason.

Mosher questioned the fairness of Gross not giving a chance to applicants who had never previously worked for him. Gross responded that he did not need a reason under section 4.03. Mosher repeated what he had said. They went back and forth.

Someone other than Gross or Mosher brought up Warrings' name. Thereafter, Mosher made disparaging comments about Warrings and his management style (which he had observed at a different jobsite), and directly or implicitly criticized Gross for employing Warrings as general foreman. Thus, both Gross and Mosher testified that Mosher stated that Warrings bullied employees, and, Mosher also said that he did not like Warrings.³ Gross did not specifically respond.

The exchange between Mosher and Gross was animated, perhaps to the level of heated, but devoid of any threatening behavior, and Mosher's tone was elevated but not out of the ordinary for a grievance hearing.⁴ I therefore do not credit Gross to the extent that I believe he exaggerated Mosher's level of emotion during their exchange and relied on that as a reason for later not hiring him.

After Gross had left, the committee unanimously decided that the Respondent's rejection of Miller did not violate the agreement and that the grievance therefore lacked merit. See General Counsel Exhibit 7. There is no evidence that grievances have ever been filed against Warrings for bullying or otherwise engaging in improper behavior toward union members on any jobsites.

Mosher's Referrals to Lafarge

The Lafarge project, a large scale expansion and retrofit of an existing cement plant in Ravena, New York, was by far the Respondent's biggest job at all times relevant; and for the period from October 20 to November 7, by far the largest number of union referrals for journeymen jobs were for the Respondent's work there. See General Counsel Exhibit 17, the Union's day book report covering that time frame.

The Respondent has a contract of about \$30 million for electrical work at Lafarge, where it started work in approximately March or April. The Respondent currently employs on the site about 120-130 electricians who are engaged on providing additional add-ons that the client has requested. Jones is the superintendent or project manager, Warrings is lead general foreman, and Joe Greene is another general foreman. Jones and Warrings are union members and obtained their employment at the project through the Union's referral system, and presumably the same holds true of Greene. Under the general foremen are

³ Credited testimony of Chamberlain, Gross, and Haggerty. Chamberlain also recalled that Mosher called Warrings "an asshole." Tr. 297.

⁴ Credited testimony of Chamberlain at Tr. 298; see also Tr. 183 (Haggerty—neither of them raised his voice); Tr. 141 (Lajeunesse—nothing out of the ordinary happened).

foremen who directly supervise the journeymen.⁵ The Company has different supervisors on other jobs.

Through the contractual hiring hall procedures previously described, Mosher applied to work at Lafarge on October 20, 21, 24, 27, 28, and 31, and November 3 and 4, and was rejected each time. See General Counsel Exhibit 10, which also shows that other applicants were rejected multiple times. For the period from August 3, 2016, through March 8, 2017, Mosher did not otherwise apply for Lafarge or to work on four small jobs for which the Respondent requested journeymen. See General Counsel Exhibit 11.

General Counsel's Exhibits 12 and 13 consist of a series of October 20 internal management emails concerning the nine journeymen, including Mosher, whom the Union referred for Lafarge that day. In the first email, sent to various management representatives, Assistant Controller Joey Vogt rejected four of them (not including Mosher) and requested input on the others.

He received responses from Jones and Field Supervisor Brian Pronto. Jones stated that feedback was needed on Mosher ("he may be president of the local") and (first name unclear) Joseph ("a[sic] organizer."). Pronto stated, "Joe may be rejecting [Mosher], stand by I can't get a straight answer."

In another email, Jones rejected one of the five remaining journeymen. The final email was from Gross, agreeing to three of the applicants (including Joseph) but rejecting Mosher.

Michael Martell, a journeyman electrician employed by the Respondent at Lafarge, and union steward there, testified without controversy about jobsite conversations that he had with Jones and Warrings on October 21.

Inasmuch as both Jones and Warrings are admitted agents of the Respondent, I reject the Respondent's contention that Martell's testimony concerning their statements to him was uncorroborated hearsay and "must be disregarded and discredited." (R. Br. at 25.) Rather, Federal Rules of Evidence, Rule 801(d)(2)(D) provides that a statement by a party's agent concerning a matter within the scope of the agency or employment, made during the existence of the relationship, is not hearsay if offered against a party as an admission by a party-opponent. See *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), *enfd.* 26 Fed. Appx. 435 (6th Cir. 2001). Therein, the judge credited a union vice president's testimony about what a company negotiator said to him regarding statements that the negotiator had heard from other members of the employer's negotiating team. On that basis, the judge found bad-faith bargaining. The Board, citing Section 801(d)(2)(D), rejected the respondent's argument that the statements constituted inadmissible double hearsay, and upheld the judge's determinations. See also *Times Union, Capital Newspapers Division*, 356 NLRB 1339, 1339 fn. 1 (2011); *United Rubber Workers, Local 878 (Goodyear Tire & Rubber Co.)*, 255 NLRB 251, 251 fn. 1 (1981).

Furthermore, an administrative law judge has the discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the

party's agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). In that circumstance, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd. mem.* 861 F.2d 720 (6th Cir. 1988).

Finally, Martell's testimony about his conversation with Jones was corroborated in relevant part by the tape recording that he made as they spoke. (GC Exhs. 20(a) (the tape recording), 20(b) (a transcript thereof).)

Accordingly, I credit Martell's un rebutted versions of those conversations and find the following.

On the morning of October 21, Martell approached Warrings at or near the main office trailer. Martell expressed concern about members being turned down for work at Lafarge, including those who had not previously worked for the Company. Warrings stated that the Respondent had a "do not hire list" of people who for one reason or another would not be accepted. Martell stated that he knew that Mosher had been refused work, to which Warrings replied:⁶

John had gone around bad mouthing Joe Gross and his company and Bob Warings[sic], and that if John thought that he was going to go around and speak negatively of the Company and of Bob, and then think he was going to work for him, that it wasn't going to happen.

Warrings then spoke briefly about employees who had been on the do not hire list but then taken off of it.

Later that morning, Martell approached Jones outside the field foreman's office. He expressed the same concern that he had voiced to Warrings and cited Mosher as an example of someone being turned down if he had not before worked for the Respondent. Jones also responded that the Company had a do not hire list, stating that Mosher "had burned his bridge with Gross Electric due to his actions at a previously interaction with Joe Gross"⁷ and that if Mosher wanted to pursue any other action, he would have to speak directly to Gross.

At a LMCC meeting in approximately November, Gross asked to meet separately with Lajuenesse and Mosher about settling the NLRB matter. During the course of their conversation, Gross stated that he had rejected Mosher because of what Mosher had said about Warrings and his management style, and Gross' desire to avoid a hostile worksite situation.

Gross testified that he alone made the decision to reject Mosher for work as a journeyman electrician at Lafarge, "based on his negative comments" at the September 27 hearing, "and the nature of his emotional state saying it."⁸ The Respondent does not dispute that Mosher was qualified to perform the work.⁹

⁶ Tr. 287.

⁷ Tr. 273-274.

⁸ Tr. 248-249; see also Tr. 247-248 (Mosher was rejected because he expressed dislike for the supervisors and because his hire would create a potential hostile workplace situation).

⁹ See Tr. 74-75.

⁵ Un rebutted testimony of Mosher at Tr. 96 and Journeyman Electrician Martell at Tr. 270.

In the past, Gross has hired other union officers and executive board members.¹⁰

Analysis and Conclusions

Initially, I will address the impact of Sec. 4.03 of the collective-bargaining agreement, which the Respondent's amended answer raised as an affirmative defense to its rejection of Mosher. The General Counsel's brief (at 20-21) correctly states the law on the matter. Thus, the unfettered right of the Respondent to refuse referrals under Sec. 4.03 does not serve to insulate the Respondent from liability it might have for engaging in unlawful discrimination under the Act. As the Supreme Court said in *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944), "'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.' . . . Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." See also *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347-348 (1938).

In determining whether a refusal to hire is unlawful, the governing test is set out in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), *enfd.* 301 F.3d 83 (3rd Cir. 2002). Initially, the General Counsel must show the following to establish a *prima facie* case: (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicant.

Once the General Counsel has met that burden, the burden shifts to the respondent to show that it would not have considered or hired, respectively, the applicant even in the absence of his or her union activity or affiliation.

As to elements one and two above, there is no dispute that the Respondent was hiring at the times that Mosher applied to work as a journeyman electrician at Lafarge, or that he was qualified to perform such work.

The issue is whether the General Counsel has met element three, showing that Gross' decision not to hire Mosher was based on antiunion animus.

It is well established that disruptive and disrespectful conduct of applicants during the application process can lead to the conclusion that the employer would not have hired them regardless of their union activity. *Exterior Systems, Inc.*, 338 NLRB 677, 678 (2002), citing *Heiliger Electric Corp.*, 325 NLRB 966, 966 fn. 3 and 968 (1998) ("[T]here is no provision in the Act or in the law developed by the Board that would require an employer to . . . [be] subjected to rude or intimidating conduct."). See also *J & R Roofing Co.*, 350 NLRB 694 (2007), in which the Board found that the respondent met its rebuttal of showing that it would not have hired the applicants regardless of their union activities, because of their lewd and sexually offensive comments.

Here, Mosher's conduct at the September 27 grievance hearing was not in conjunction with his application for employment, and it certainly did not rise to the level of disruptive or offensively disrespectful. The question, though, is whether or not, his criticisms of the Company's policies, Warrings' conduct as a manager, and Gross (directly or indirectly) can be considered as related to his position as union president.

There is no evidence that any grievances have ever been filed against Warrings for bullying or other inappropriate conduct, either at Lafarge, any other jobs of the Respondent, or any other jobs of other contractors. Additionally, there is no evidence that the Union has ever filed grievances against, or otherwise objected to the Respondent's policies rejecting applicants under section 4.03 of the contract, either because they had not previously worked for the Company, or otherwise. Indeed, all of the union members of the labor-management committee (including Mosher) agreed with the employer representatives that Miller's challenge of rejection on that basis had no merit under the agreement, and Fitzmourice even stated that the Respondent could refuse Miller under section 4.03. Accordingly, by arguing to the contrary, Mosher was taking a position at odds with the Union.

Other significant factors include the following:

- (1) The Respondent has rejected numerous other applicants and at a higher rate than other contractors that are signatory to the agreement.
- (2) Gross is a union contractor and himself a member of the Local, as are his managers at Lafarge.
- (3) In the past, Gross has hired Local officers and board members.
- (4) The record is devoid of any evidence that Gross has expressed animus toward the Union or committed other unfair labor practices.

The General Counsel (Br. at 19) cites *Yesterday's Children, Inc.*, 321 NLRB 766, 767 (1996), vacated in relevant part 115 F.3d 36 (1st Cir. 1997), and other cases, for the proposition that employees engaged in Section 7 activity in protest of actions by their employer do not lose the Act's protection simply because they mention that they dislike a manager and would like to see the manager discharged. Those cases are distinguishable. Here, Mosher was not engaged in any protected concerted activity as an employee *per se*; rather, his conduct was solely in connection with his role as a union official. As noted above, his statements about the Respondent's hiring policies did not mesh with the Union's position, and Warrings' "bullying" conduct has never been the subject of grievances or any protests by the Union. Finally, Mosher's statements about Warrings' "bullying" were generalized criticisms of his management style, not tied to any specific actions that might violate the collective-bargaining agreement.

In all of these circumstances, I conclude that Gross refused to hire Mosher for Lafarge because he took offense at Mosher's criticisms of him, his policies under the contract that the Union has not contested, and Warrings, and not because of antiunion animus.

Accordingly, I conclude that the General Counsel has failed to establish a *prima facie* case of unlawful failure to hire. As-

¹⁰ Tr. 172-173 (Lajeunesse).

suming *arguendo* a *prima facie* case, I conclude that the Respondent would not have hired Mosher even aside from any union considerations because of Gross' displeasure over Mosher's statements at the September 27 hearing that were not sufficiently within the purview of his role as Local president to constitute activity on behalf of the Union.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in any unfair labor prac-

tices under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 22, 2017

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.